

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

CARLA ELKINS, MICHAEL JACKSON,)
)
 Plaintiffs,)
)
 v.)
)
 NORTH CAROLINA DEPARTMENT)
 OF PUBLIC SAFETY,)
)
 Defendant.)

**COMPLAINT AND PETITION
 FOR BREACH OF CONTRACT
 AND DECLARATORY JUDGMENT**

Comes now the Plaintiffs through counsel seeking relief against the Defendant as set forth below:

PARTIES

1. Plaintiffs Carla Elkins and Michael Jackson are citizens and residents of North Carolina. Plaintiffs are career status employees of the North Carolina Department of Public Safety (“Defendant” or “DPS”) in positions subject to Chapter 126 of the North Carolina Human Resources Act (“HRA”). Plaintiffs are entitled to bring an action in this Court under the Uniform North Carolina Declaratory Judgment Act (N.C.G.S. § 1-253) as well as an action for breach of contract.
2. DPS is a Cabinet level executive agency of the State of North Carolina, a general purpose state government. DPS as such has the capacity to sue and be sued, including for actions brought under the North Carolina Uniform Declaratory Judgment Act and actions for breach of contract. DPS is subject to and required to act in compliance with the Constitution and laws of North Carolina, and may not legally or lawfully take actions in violation of express constitutional provisions set forth in the Constitution of North Carolina and/or necessary implications therefrom.

JURISDICTION AND LACK OF ADMINISTRATIVE REMEDIES

3. The Superior Court of Wake County has jurisdiction to hear this action pursuant to N.C.G.S. § 1-253, the North Carolina Uniform Declaratory Judgment Act and As citizens and residents of the

State of North Carolina, Plaintiffs are entitled to petition this Court pursuant to N.C.G.S. § 1-253 for a declaration as to (a) the retroactive effect of clarifying legislation protecting the rights and property of the Plaintiffs, and (b) the constitutionality of actions by DPS which materially damage or diminish rights held by the Plaintiffs under the Constitution of North Carolina.

4. Plaintiffs are among the class of persons directly, necessarily, and adversely affected by operation of the challenged actions by Defendant, and a genuine case or controversy exists between the Plaintiffs and DPS regarding same.
5. Plaintiffs are additionally entitled to call on this Court through its general judicial power to rule on breach of contract issues and to enforce contractual rights on contracts made in North Carolina between persons and entities located in North Carolina.
6. Plaintiffs have no administrative remedies that may be exercised in this case. Any attempt at exhausting any potential administrative remedy was and is futile, pointless, and inadequate as any remedies that might exist cannot provide the remedies sought and because the challenged statute(s) involve constitutional violations of fundamental rights. The Office of Administrative Hearings, which is the primary source of administrative relief in this State, lacks the authority to declare a State action unconstitutional under either the North Carolina or the Federal constitution and a constitutional claim of the kind alleged here may not be raised in such an administrative forum. “The question of constitutionality of a statute is for the judicial branch.” Great American Insurance Co. v. Gold, 254 N.C. 168; 118 S.E.2d 792 (1961); Jernigan v. State, 279 N.C. 556; 184 S.E.2d 259 (1971). Further, the OAH may not adjudicate breach of contract disputes between citizens and the State under the circumstances here existing.

IMMUNITIES

7. DPS does not have immunity from suit for actions under the Uniform Declaratory Judgment Act seeking a determination as to the constitutionality of a provision of the General Statutes of North Carolina. Further, DPS does not have immunity from suit in actions for breach of contract in cases, as here, where the State is a party to that contract. Smith v. State, 298 N.C. 115; 257 S.E.2d 399; (1979).

VENUE

8. Venue is proper in the Superior Court of Wake County, North Carolina pursuant to N.C.G.S § 1-82, as Wake County, North Carolina is the seat of government for the State of North Carolina and is the location of the headquarters of DPS.

FACTS

9. Plaintiffs are all career status employees of DPS subject to the North Carolina Human Resources Act (“HRA”) and having a property interest in their employment with the State of North Carolina.
10. In 2015, the North Carolina Office of State Human Resources (“OSHR”) completed a pay classification study and proposed a new salary structure for correctional custody staff. Under N.C.G.S. 126-3(b)(6), OSHR has the approval authority of personnel actions involving classification and compensation where such approval authority has not been transferred by the [State Human Resources] Commission (SHRC) to agencies, departments, and institutions or where such authority has been rescinded for noncompliance. Under N.C.G.S. 126-4, the SHRC also establishes policies and rules governing the following matters, among others: (a) Position classification plans which shall provide for the classification and reclassification of all positions subject to this Chapter according to the duties and responsibilities of the positions, and (b) Compensation plans which shall provide for minimum, maximum, and intermediate rates of pay for all employees subject to the provisions of [Chapter 126].
11. The General Assembly has delegated, to the extent of the commission's statutory powers, its own legislative powers over the State's personnel system to the SHRC. Therefore, rules and policies made pursuant to the SHRC’s statutory authority have the effect of law. North Carolina Dep't of Justice v. Eaker, 90 N.C. App. 30, 367 S.E.2d 392, cert. denied, 322 N.C. 836, 371 S.E.2d 279 (1988).
12. The new salary structure (“the raises”) increased the starting pay for Correctional Officers and provided classification raises to experienced Correctional Officers and on information and belief other personnel.

13. Plaintiffs were among the class of persons eligible for the raises and had a vested right in the raises.
14. On information and belief, DPS leadership wished to avoid or evade its obligation to pay the raises to all eligible employees, including Plaintiffs.
15. On information and belief, DPS management directed prison management and command staff to issue written warnings to as many employees as possible prior to the effective date of the raises. Plaintiffs are informed and believe, and therefore allege, that in the time period between 2013 and 2016, there was a 119.5% year over year increase in written warnings issued by DPS.
16. Written warnings are formal disciplinary action under the HRA, and may only be issued for “just cause.”
17. At or about the same time, on information and belief, DPS without direction or approval by OSHR or the SHRC, enacted an “internal policy” (afterwards, the “Raise Evasion Policy”) which made employees who received written warnings or other disciplinary action that were active at the effective date the raises were “ineligible” for the raises. Thus, written warnings (after, the “Sham Written Warnings”) were used, Plaintiffs allege, without just cause and/or as a budgetary tool for DPS’ financial gain and to violate vested employee rights as opposed to being employed as legitimate disciplinary actions to improve job performance or workplace conduct.
18. Plaintiffs are informed and believe, and therefore allege, that DPS issued the Sham Written Warnings lacking substantive just cause to numerous employees for the sole or primary purpose of making those employees “ineligible” for raises in which they had vested rights, and thus saving DPS the funds that would have otherwise been required to the raises. Plaintiffs are informed and believe, and therefore allege, that DPS on more than one occasion handed out two Sham Written Warnings to certain employees in order to extend and further delay the time when those employees could receive the raises.
19. Among the Sham Written Warnings’ deficiencies, Plaintiffs allege on information and belief, were:

- a. The issue should have been properly and fairly handled, at worst, with a coaching session or Documented Counseling Session, in that the issue lacked substantive just cause to rise to the level of a justified formal written warning;
 - b. Issuing Sham Written Warnings with the specific intent of employing that action to deny Plaintiffs and similarly situated DPS personnel the raises they were entitled to by law;
 - c. Command staff exhibited bias in distribution of Written Warnings by ignoring similar or identical conduct in favored officers;
 - d. Incomplete and inadequate “just cause” investigations. For example, a frequent complaint is that management did not question all witnesses, did not review relevant video footage, took an inmate’s word over the word of an officer, or issued Written Warnings based on unprofessional, non-performance related criteria such as race, some perceived slight at work, or membership in an affinity group that is different from that of the command staff;
 - e. Sham Written Warnings were given for stale conduct that occurred as much as one year prior to the date the Warning was finally issued, in direct violation of the law (Renfrow v. N.C. Dep’t of Revenue, 245 N.C. App. 443, 782 S.E.2d 379 (2016)); and,
 - f. Gamesmanship with the effective date of a Written Warning. For example, reactivating or re-aging a Written Warning that had previously become inactive due to passage of time. In these cases, the Written Warning became inactive by passage of 18 months of time. DPS administration in Raleigh then changed the effective date and reactivated the Written Warning, thereby disqualifying the officer from receiving the next scheduled classification raise.
20. On information and belief, DPS also enacted and enforced another internal policy, also not a policy of OSHR, which prohibited correctional staff from transferring from one prison facility to another if they had certain kinds of active disciplinary action (afterwards the “Transfer Prohibition Policy.”) On information and belief, DPS has multiple prison facilities which are known by corrections officers, as undesirable (the “Undesirable Prisons”). These are facilities which are or perceived to be particularly understaffed, underequipped, dangerous, or otherwise undesirable, and correctional officers were frequently attempting to transfer out of the Undesirable Prisons to more desirable prison facilities. DPS employed, Plaintiffs allege, the Transfer Prohibition Policy to in effect indenture its employees at Undesirable Prisons which, due to their poor working conditions and DPS’ poor management, were difficult to staff. The issuance of Sham Written Warnings was the tool to enforce the Transfer Prohibition Policy.

21. As noted, on information and belief, DPS enacted the Transfer Prohibition Policy solely to in effect “indenture” its employees at the Undesirable Prisons. No such policy had been enacted or on information and belief approved by the North Carolina Office of State Human Resources, which sets personnel policy for agencies in the State government of North Carolina. Further, on information and belief, Defendant’s management, just as with the raise issue, instructed command staff and administrators to issue as many written warnings as possible to corrections staff in order to prevent them from transferring from the Undesirable Prisons under the Transfer Prohibition Policy. These Sham Written Warnings, Plaintiffs allege, present many of or all of the same issues as the Sham Written Warnings used to deny DPS employees raises.
22. In 2018, as noted, the General Assembly specifically forbade DPS from denying raises based on prior infractions or active disciplinary action. Section 35.20, Senate Bill 99. The sole exception is written warnings for “gross inefficiency,” a type of disciplinary action that, in the context of the Defendant, in most cases arises when DPS alleges an employee commits unsatisfactory job performance that, because of the act or omission, results in the potential for death or serious injury to persons in State custody (here, inmates). Donoghue v. N.C. Dep't of Corr., 166 N.C. App. 612, 616, 603 S.E.2d 360 (2004).
23. As a clarifying statute, Plaintiffs allege that the 2018 amendment should and must apply retroactively to persons, such as Plaintiffs, who were by statute eligible for the raises at the time they took effect, but were denied them to Defendant’s Raise Evasion Policy. Ray v. N.C. DOT, 366 N.C. 1, 727 S.E.2d 675, (2012).
24. Despite the referenced repeal, DPS during the time period from 2016 to 2018 illegally and wrongfully operated the Raise Evasion Policy to avoid its obligation, mandated by the General Assembly, to pay to persons such as Plaintiffs the raises required by law and in which Plaintiffs and other similarly situated DPS personnel had vested rights. Further, Plaintiffs allege, DPS illegally and wrongfully, and contrary to State policy, directed command staff and administrators to issue Sham Written Warnings and/or other discipline to employees for the purpose of denying significant numbers of DPS employees the pay raises mandated by law and in which those employees had vested rights.

25. Further, Plaintiffs allege, DPS continues to operate the Transfer Prohibition Policy to illegally and wrongfully issue Sham Written Warnings and/or other discipline to employees for the purpose of preventing those employees from transferring to other facilities.
26. Plaintiffs are informed and believe, and therefore allege, that DPS has employed the Sham Written Warnings for these purposes because written warnings are not appealable to the North Carolina Office of Administrative Hearings, thus giving the employees no reasonable opportunity to contest the disciplinary action and no opportunity to obtain administrative review of whether the warnings were legitimate disciplinary actions with just cause or were wrongfully issued in order to operate the wrongful and illegal policies referenced herein (see “Lack of Administrative Remedies”).
27. Defendant’s operation of the Raise Evasion Policy and the Transfer Restriction Policy has permitted DPS to wrongfully deny Plaintiffs and other affected employees benefits and property interests, as well as vested contractual rights, conferred upon them by statute and case law and has wrongfully damaged and diminished the affected employees’ constitutionally protected property interests in employment with the State of North Carolina.

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

28. All previous paragraphs are hereby re-alleged and incorporated by reference as if fully set forth.
29. Plaintiffs are career status State employees subject to the HRA. Accordingly, the HRA was incorporated by operation of law into Plaintiffs’ contracts of employment with DPS. “The State Personnel Act is, by statute, a part of each qualifying state employee’s contract.” Soles v. City of Raleigh Civ. Serv. Comm’n, 345 N.C. 443, 447, 480 S.E.2d 687 (1997).
30. Among the vested and constitutionally and contractually protected interests in State employment is the right for employees not to be disciplined without just cause. 25 N.C.A.C. 1J.0604, among other regulations having the force of law, as well as case law, makes clear that no State employee subject to the HRA may receive formal discipline, including written warnings, without just cause.
31. On information and belief, DPS issued the Sham Written Warnings not out of a sincerely held or proven belief in just cause for such action, but with the intention of preventing eligible employees

from obtaining raises to which they were vested and entitled by law and circumventing the requirement that the raises be implemented. Further, on information and belief, DPS directed that Sham Written Warnings issue to Plaintiffs and others not out of a sincerely held or proven belief in just cause for such action, but with the intention of preventing Plaintiffs from transferring to different prison facilities.

32. In so doing, DPS among other violations, via the Sham Written Warnings breached and violated the contractual requirement that disciplinary action issue solely for just cause, and accordingly materially breached the contract of employment between Plaintiffs and DPS. DPS additionally materially breached the contract of employment between Plaintiffs and DPS by using the Sham Written Warnings to deny and materially impair Plaintiffs' vested rights in the raises herein discussed.
33. As a direct and proximate result of these material breaches of contract by DPS, Plaintiffs have been damaged, and they are entitled to have and recover from DPS a money judgment in an amount in excess of Fifty Thousand Dollars (\$50,000).

FOR A SECOND CAUSE OF ACTION – ALTERNATIVE COUNT

(Declaratory Judgment – Article 1, Section 1 and Article 1, Section 19, Article 1, Sections 35 and 36)

34. All previous paragraphs are hereby re-alleged and incorporated by reference as if fully set forth.
35. In addition and/or in the alternative to Plaintiff's action for breach of contract, this Complaint and Action for Declaratory Judgment is brought pursuant to the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253, to challenge the constitutionality under the Constitution of North Carolina of DPS' actions as complained of herein and to determine the retroactive effect of the statutory clarification prohibiting DPS from engaging in such activity with respect to the Sham Written Warnings. In this alternative pleading, Plaintiffs likewise have no remedy at law available for the injuries complained of herein and thus are entitled to bring an action for declaratory judgment to determine the rights and responsibilities of the parties, seek redress of constitutional violations, and determine the retroactive effect of the clarifying statute.

36. DPS' actions as complained of in this Complaint are "state action" for purposes of constitutional analysis.
37. Plaintiffs are persons directly affected by the matters on which declaratory judgment is sought and a genuine case or controversy exists between Plaintiffs and DPS on those matters.
38. The North Carolina Uniform Declaratory Judgment Act permits the Superior Court to issue a declaratory judgment as to the constitutionality of state action. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971). This includes actions concerning the rights of State employees in North Carolina. Sanders v. State Human Resources Comm'n, 197 N.C. App. 314, 677 S.E.2d 182 (2009), review dismissed, 363 N.C. 806, 691 S.E.2d 20 (2010).
39. As noted, the OAH has no authority or jurisdiction to hear constitutional claims regarding the validity of a state statute under the State or Federal constitution. Accordingly, any administrative remedies available to Plaintiffs are both inadequate and futile.
40. Under the authority of § N.C.G.S. 1-253, the North Carolina Uniform Declaratory Judgment Act, Plaintiffs are entitled, as persons whose rights and property are directly affected by the challenged State action, to bring this action for a declaratory judgment regardless of whether further relief is or could be claimed.
41. Under the authority of N.C.G.S. § 1-264, the North Carolina Uniform Declaratory Judgment Act is remedial, and is to be liberally construed and administered.
42. Plaintiffs, upon reaching "career" status, had a constitutionally protected, fully vested property interest and contractual interest with respect to their employment with the State of North Carolina through DPS that created a reasonable expectation of continued employment with the State of North Carolina/DPS and which could not be infringed upon or damage by disciplinary action except under legitimate, proven conditions of just cause.
43. Plaintiffs, as members of the class of persons affected by raises, have a vested and constitutionally and contractually protected interest in receiving the aforementioned raises. They also have a

constitutionally protected interest in not receiving formal disciplinary action without just cause, as was and is the case with the Sham Written Warnings.

44. Having created a property interest in Plaintiffs' employment with the State of North Carolina, an agency of the State of North Carolina, such as DPS, may not constitutionally impair that property interest without appropriate process. "The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Cleveland Board of Education v. Loudermill, et. al., U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494; 1985 U.S. LEXIS 68.
45. DPS' actions as complained of herein act and has acted to take or damage and diminish Plaintiffs' vested property and contract rights without any process related to that taking. As noted, on information and belief, DPS chose Sham Written Warnings for this process because written warnings do not contain substantive administrative appeal rights. Accordingly, in this case DPS has done what is constitutionally impermissible: taken and/or damaged the Plaintiffs' vested property and contract rights not just with a lack of appropriate procedural safeguards or compensation, but with no safeguards or compensation whatever.
46. In North Carolina, our State Constitution (unlike the Federal) places special emphasis on rights concerning the affected citizen's opportunity to earn a living. Article I, Section I of the Constitution of North Carolina specifically holds that among the "inalienable rights" of North Carolina citizens, to which specific constitutional protection is extended, include the right to "enjoyment of the fruits of their own labor". The constitutional importance of government agencies in North Carolina acting fairly, consistently, and with due process toward their employees was re-emphasized by our Supreme Court recently in Tully v. City of Wilmington, 810 S.E.2d 208, 2018 N.C. LEXIS 65 in which it held that the governmental employer arbitrary and capriciously denied its employee the fruits of his own labor, in violation of Article I, Section 1 of the Constitution of North Carolina.
47. In this case, DPS' practices in (a) created policies unapproved by OSHR for the sole purpose of denying its employees mandated raises, (b) creating policies unapproved by OSHR for the sole purpose of preventing employee transfers, (c) issuing written warnings to employees not for just cause, but to deny them raises and bring financial gain to DPS, and (d) refusing to retroactively

address those issues in the wake of clarification of them by the General Assembly, were arbitrary and capricious and, in addition to the other violations identified herein, violated Article I, Section 1 of the Constitution of North Carolina. Plaintiffs accordingly also seek a declaratory judgment to this effect.

48. DPS' actions as complained of herein lack even a rational or reasonable relationship to an important government objective. Indeed, DPS' actions operate to directly subvert the will of the General Assembly and involve abuse and disregard of the equally critical contractual and constitutional rights discussed herein.
49. Additionally or in the alternative, Plaintiffs have and have had a fundamental right under Article I, Section 19 of the Constitution of North Carolina to not have property taking by Defendant's actions without their consent, without just compensation, and without due process of law, and DPS has no compelling state interest in being permitted to damage or impair Plaintiffs' property without their consent, without just compensation, and without due process of law.
50. It is likewise beyond dispute that as of obtaining career status, Plaintiffs had vested contractual and property rights including the right to receive formal disciplinary action only for legitimate just cause. "There is no provision in the Federal or State Constitution which prohibits the passage of retroactive or retrospective laws, as distinguished from those that are ex post facto, **unless they impair the obligation of contracts or disturb vested rights.**" Bateman v. Sterrett, 201 N.C. 59, 63; 159 S.E. 14 (1931); citing Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930); Stanback v. Bank, 197 N.C. 292, 148 S.E. 313 (1929).
51. In North Carolina, our State Constitution's equivalent of the Contracts Clause is Article I, Section 19 – the "Law of the Land" clause:

Sec. 19. Law of the land; equal protection of the laws

*No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, **or in any manner deprived of his life, liberty, or property**, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.*

52. Article I, Section 19 “was copied in substance from Magna Carta by the framers of the Constitution of 1776,” and “is synonymous with ‘due process of law,’ a phrase appearing in the Federal Constitution and the organic law of many states.” State v. Ballance, 229 N.C. 764; 51 S.E.2d 731 (1949).
53. The Law of the Land clause has long been interpreted to incorporate a protection for our citizens against the taking of property with no due process or compensation. Long v. City of Charlotte, 306 N.C. 187, 196, 293 S.E.2d 101 (1982); State ex rel Utilities Commission v. Buck Island, Inc., 162 N.C. App. 568, 592 S.E.2d 244. Also, given that the protections of the State Human Resources Act and North Carolina Administrative Code not to be formally disciplined without just cause were incorporated into Plaintiffs’ contract of employment with the State, it is well settled that contract rights – including those created by statute – are property rights that are protected by the Law of the Land Clause’s bar against uncompensated takings. Bailey v. State, 348 N.C. 130; 500 S.E.2d 54; (1998).
54. “The State Personnel Act is, by statute, a part of each qualifying state employee’s contract.” Soles v. City of Raleigh Civ. Serv. Comm'n, 345 N.C. 443, 447, 480 S.E.2d 687 (1997). After these rights had clearly vested, DPS by the acts complained of herein impaired those rights in a material fashion, and in such a way as to deprive and damage Plaintiffs’ of vested property rights without any process and to materially impair their vested rights under their contracts of employment with DPS.
55. The Law of the Land Clause forbids such impairment. Though no person has a generalized vested right to the continuance of existing law, Pinkham v. Pinkham, 227 N.C. 72, 40 S.E.2d 690 (1946), Pinkham itself notes that “rights may accrue under a statute, or even be conferred by it, of such a character as to be contractual, and which cannot be defeated by subsequent legislation.” Pinkham at 78. See also Ogelsby v. Adams, 268 N.C. 272, 273, 150 S.E.2d 383, 385-386.
56. There is no rational basis for agency action that simply, in addition to depriving an individual of property, materially impairs his or her valid and vested contract or impairs rights thereunder, for the purpose of that agency’s pecuniary gain and/or to cause financial harm to the individual concerned.

57. Accordingly, Plaintiffs additionally seek a declaratory judgment that the DPS actions complained of herein violate, beyond any reasonable doubt and as applied to Plaintiffs, Article I, Section 19 of the Constitution of North Carolina as in violation of both due process of law and via material impairment of existing contracts. Defendant's actions are accordingly arbitrary and capricious, illegal, unconstitutional, and void, and DPS should be retroactively enjoined from such actions, as well as prohibitively enjoined going forward. A substantial violation of fundamental rights as presented herein is prima facie support for injunctive relief as the continuing violation of those rights created and continued to cause irreparable harm to the Plaintiffs.

WHEREFORE, Plaintiffs pray for the following relief:

1. That this Court issue a declaratory judgment that the challenged State action by DPS is unconstitutional and void, both retroactively and prohibitively.
2. Alternatively or additionally, that DPS be ordered to pay to Plaintiffs a money judgment in excess of Fifty Thousand Dollars (\$50,000).
3. That the costs of this action, including reasonable attorney's fees, be taxed to DPS as permitted by law; and,
4. That this Court grant Plaintiffs such additional and further relief as it deems appropriate, including but not limited to appropriate injunctive relief.

June 25, 2018.

Respectfully submitted,

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